IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 10940 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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PRAJAPATI ARVINDBHAI RAMESHBHAI - Applicant(s)
Versus
THE STATE OF GUJARAT & 10 - Respondent(s)

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Appearance :

MR SIDDHARTH H DAVE for Applicant(s) : 1,
MR PD BHATE, APP for Respondent(s) : 1,
MR MM TIRMIZI for Respondent(s) : 2 - 11.

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 13/03/2007

ORAL JUDGMENT

1. By way of this application under Section 439(2) of the Code of Criminal Procedure, the applicant – original complainant has prayed for cancelling the bail granted to respondent Nos.2 to 11 by this Court vide order dated 01.08.2006 passed in Criminal Misc. Application No.7538 of 2006.

2. The short facts of the case are that the applicant had filed a complaint being I – CR No.83 of 2006 before Patan City Police Station for the offences punishable under Sections 323, 326, 504, 147, 148, 149 and 114 of the Indian Penal Code (hereinafter referred to as “the IPC”) and Section 135 of the Bombay Police Act against original accused Nos.2 to 10. Pursuant to investigation into the

alleged offence, the name of respondent No.11 herein appeared as an accused and therefore, he was also arrested along with all other accused persons. On the same day, the accused persons filed an application for deleting Section 326 of the IPC before learned Chief Judicial Magistrate, Patan. It appears that on the said application, no orders were passed by the learned Chief Judicial Magistrate. The original accused Nos.2 to 11 also preferred an application before the learned Chief Judicial Magistrate, Patan for their release on bail. The said application came to be disposed of by the learned Chief Judicial Magistrate, Patan vide order dated 22.05.2006 and respondent Nos.2 to 11 were ordered to be enlarged on bail.

3. Being aggrieved by the same, the State of Gujarat filed Criminal Revision Application No.30 of 2006 before learned Additional Sessions Judge, Fast Track Court, Patan for cancellation of bail. The said Criminal Revision Application came to be allowed vide order dated 04.07.2006 and the bail granted to the accused persons by the learned Chief Judicial Magistrate, Patan was ordered to be cancelled and the accused persons came to be arrested.

4. Thereafter, original accused Nos.2 to 11 preferred an application for regular bail before this Court being Criminal Misc. Application No.7538 of 2006. The said application came to be disposed of by this Court (Coram : Mr. Akshay H. Mehta,J.) vide

order dated 01.08.2006 and the original accused Nos.2 to 11 were ordered to be released on regular bail.

5. It is alleged by the applicant – original complainant that opponent Nos.2 to 11 had been released on bail by making misrepresentation before this Court and by suppressing material facts. Therefore, their bail is required to be cancelled.

6. Mr.S.H.Dave, learned advocate for the applicant submitted that the FIR being I – CR No.83 of 2006 was filed on 21.04.2006 for the offences punishable under Sections 323, 326, 504, 147, 148, 149 and 114 of the IPC and Section 135 of the Bombay Police Act and therefore, there is no question that offence punishable under Section 326 was subsequently added. Learned advocate submitted that in fact original accused Nos.2 to 11 had preferred an application for deleting Section 326 of the IPC before the learned Chief Judicial Magistrate. Therefore, opponent Nos.2 to 11 had made misrepresentation before this Court that the FIR was filed only for the offences punishable under Sections 323, 504, 147, 148, 149 and 114 of the IPC and Section 135 of the Bombay Police Act, and that Section 326 of the IPC was added subsequently only. Hence, the bail granted to the accused by this Court is required to be cancelled.

7. Learned advocate for the applicant has relied upon a decision of this Court reported in the

case of Abdul Sattarbhai Mohmed Hussain Shaikh V/s. State of Gujarat and others, 2004(3) GLH Page-366, wherein it has been held that where the complainant by showing preponderance of probabilities has established that the accused had attempted to temper with witnesses and has thereby abused his liberty, then, the bail granted to the accused persons is liable to be cancelled. Learned advocate has, therefore, submitted that the bail granted to the accused persons is also required to be cancelled on the grounds stated hereinabove.

8. The learned advocate for the petitioner has next relied upon the Full Bench decision of this Court in the case of B.B.Bhabhor V/s. State of Gujarat, reported in 2004(3) GLH 101 and more particularly, on the observations made in Para 8.5 which reads as under :-

> “8.5 The ratio of the above two decisions of the Supreme Court is in no way affected by the subsequent decision of the Supreme Court in Mehboob Shaikh (2004 AIR SCW 527). The Court's observations in paragraph 13 of the judgment were in the context of its earlier decision in Harjeet Singh V/s. State of Punjab, reported in AIR 2002 SC 281 in which it was held that there was a longstanding convention and requirement of judicial discipline that subsequent applications for grant or cancellation of bail should be placed before the same learned Judge who had passed the earlier order. The Supreme Court held in Mehboob Shaikh's case that this certainly was a desirable course,

> but the party making a grievance that the course is not followed has to indicate as to in what manner he was prejudiced. The Supreme Court held:
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> "But where the cancellation is sought for on grounds different from those which existed at the time of granting bail, the conventional practice of placing the matter before the same learned Judge need not be followed as if it is a statutory requirement."

Learned advocate has, therefore, submitted that this Court can entertain this application under Section 439(2) of the Code of Criminal Procedure.

9. Mr. Tirmizi, learned advocate for opponent Nos.2 to 11 submitted that Section 326 was added subsequently only by the Investigating Officer and that it did not form a part in the original complaint. Learned advocate has submitted that the Sessions Court has also believed the said fact and therefore, it had cancelled the bail granted to the accused persons.

10. Mr. Tirmizi, learned advocate for original accused Nos.2 to 11 has relied upon a decision in the case of Harjeet Singh alias Seeta V/s. State of Punjab and another reported in AIR 2001 SCW Page-4998, wherein it has been held that in an application for cancellation of bail on the ground that the accused had obtained the bail order by misrepresentation or suppression of facts, then the

said application should be placed before the same learned Judge who had granted bail, and the cancellation of bail by the other learned Judge is not proper.

11. Heard the learned counsel for the parties and perused the documents on record. While passing the order dated 01.08.2006, this Court (Coram : Mr. Akshay H. Mehta, J.) had made the following observations in Paras 2.1 and 2.2 which reads as under:-

> "2.1 It is submitted by Mr. Tirmizi that initially the applicants were granted bail by the learned Chief Judicial Magistrate, Patan by order dated 22.05.2006. However, subsequently the offence under Section 326 of the IPC was added by the I.O. and therefore, the learned Additional Sessions Judge, Fast Track Court, Patan by order dated 04.07.2006 passed in Criminal Revision Application No. 30 of 2006 preferred by the State, quashed the order of the learned Chief Judicial Magistrate, Patan and cancelled the bail granted in favour of the applicants. Hence they have now approached this Court under Section 439 of the Cr.P.C.
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> 2.2. I have perused the record of this application and also considered submissions of Mr. Tirmizi and Mr.Jani. The applicants were already released on bail by the learned Magistrate. It is only on account of the addition of offence under Section 326 of the IPC, the learned Additional Sessions Judge has cancelled the bail. Otherwise, the

> circumstances have remained the same. In view of it, there is no need to again detain them in custody i.e. to put them behind bars during pendency of the trial. Since this is an offence triable by the learned Magistrate, they are required to be granted bail."

12. On a plain reading of the above referred order, it clearly appears that original accused Nos.2 to 11 were released on bail on the statement made by Mr. Tirmizi that the offence under Section 326 of the IPC was added subsequently only and that it did not form a part in the original FIR. From the evidence on record, it transpires that the complaint was filed under Sections 323, 326, 504, 147, 148, 149 and 114 of the IPC. Pursuant to the arrest of accused persons, they had preferred an application before the learned Chief Judicial Magistrate for deleting Section 326 from the FIR. However, it appears that no orders were passed by the learned Chief Judicial Magistrate on the said application either rejecting or allowing the same. Now, since no orders were passed on the said application, the offence under Section 326 of the IPC had remained. The learned Chief Judicial Magistrate has committed an error in law, since it has no jurisdiction to entertain an application for regular bail, where the offence is one punishable under Section 326 of the IPC. In my opinion, the learned Additional Sessions Judge, after considering the aforesaid factual aspects, has rightly cancelled the bail granted to the accused persons. However, in view of the statement made by

learned advocate for the applicant before this Court, as referred to hereinabove, the accused persons were released on bail.

13. In view of the above discussion and since it has come on record that the accused persons were released on bail on the basis of misrepresentation and by suppressing material facts, their bail is required to be cancelled.

14. So far as the contention raised by Mr. Tirmizi that this Court cannot cancel the bail granted to the accused persons as the same was granted by another Court is concerned, the same shall not hold ground in view of the principle laid down in the Full Bench decision of this Court in B.B.Bhabhor's case (Supra). Thus, the regular Court before which such matters are placed, can entertain the applications. Hence, this Court is of the opinion that the applicant has shown sufficient grounds warranting interference from this Court in this application under Section 439(2) of the Code of Criminal Procedure.

16. In the result, the application is allowed. The bail granted to the original accused Nos.2 to 11 is ordered to be cancelled vide order dated 01.08.2006 passed in Criminal Misc. Application No.7538 of 2006. The original accused Nos.2 to 11 shall surrender to the custody forthwith. Rule is made absolute.

17. Before concluding, it may be noted that initially, this Court was constrained to issue notice and refer the matter to the Bar Council of Gujarat in view of the aforesaid conduct of Mr.M.M.Tirmizi, learned advocate for the original accused Nos.2 to 11. However, in view of the unconditional apology tendered by Mr. Tirmizi, no action is taken against Mr. Tirmizi.

[K.S.JHAVERI,J.]

mrpandya*